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MICHAEL RODAK, JR

(Submitted with the Consent of the Parties)

IN THE

Supreme Court of the United States

October Term, 1974

No. 73-1942

RICHARD ERZNOZNIK,

Appellant,

v.

CITY OF JACKSONVILLE,

Appellee.

ON APPEAL FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

BRIEF OF MOTION PICTURE ASSOCIATION OF AMERICA, INC., AS *AMICUS CURIAE*

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BRIEF OF MOTION PICTURE ASSOCIATION OF AMERICA, INC., AS *AMICUS CURIAE*

Interest of the *Amicus*

Motion Picture Association of America, Inc. ("MPAA") is a trade association whose membership comprises companies which are among the largest producers and/or distributors of motion pictures in the United States, including:

Allied Artists Pictures Corporation
Avco Embassy Pictures Corp.
Columbia Pictures Industries, Inc.
Metro-Goldwyn-Mayer Inc.
Paramount Pictures Corporation
Twentieth Century-Fox Film Corp.
United Artists Corporation
Universal Pictures, a division of Universal City Studios, Inc.
Warner Bros. Inc.

At the present time there are approximately 14,650 commercial motion picture theatres in operation in the United States, of which about 3,800 (or 26% of the total) are so-called "drive-ins." A substantial proportion of the films exhibited by these drive-ins are produced and/or distributed by the companies which are members of MPAA.

The instant appeal raises two questions which are of significance to the entire motion picture industry. These are: (1) the constitutionality of the specific Jacksonville ordinance under review in this case, and (2) the general constitutional considerations which govern attempts to proscribe allegedly "obtrusive" exhibitions of potentially "offensive" films. Any decision by this Court on these questions will vitally affect the constitutional interests of MPAA's member companies, as well as all other producers, distributors and exhibitors of motion pictures in the United States.

MPAA has requested and has received permission from counsel of record for both parties to file this Brief *amicus curiae*.[1]

ARGUMENT

The Jacksonville ordinance is constitutionally overbroad and therefore invalid on its face.

This case is among the many of recent years involving images on drive-in screens which are visible to persons outside the confines of the theatres.[2]

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[1] Copies of the letters giving permission are being filed with the Clerk of this Court simultaneously with the filing of this Brief.

[2] Many of these cases are collected and analyzed in MPAA's Brief *amicus curiae* in *Rabe* v. *Washington*, 405 U.S. 313 (1972) (per curiam). Others are cited in this Brief.

Although the first drive-in motion picture theatre appeared in the United States in 1933, it was not until after World War II that such theatres became prevalent.[3] Today there are about 3,800 of them, serving patrons who in many cases would not feasibly be able to view current motion pictures.[4]

When originally built, many, if not most, drive-ins were located in places where their screens were not readily visible to persons outside the confines of the theatres themselves. But as large suburban communities have radiated outward from cities (with accompanying schools, roads and other services), and as the nature of many films in general theatrical release has changed, conflicts have sometimes developed between the right of patrons to view films within the confines of a drive-in and the right of unwilling persons outside the drive-in not to be assaulted by what they consider "offensive" images emanating from the theatre's screen.

In January, 1972, the City of Jacksonville enacted an ordinance making it unlawful to exhibit at a drive-in theatre:

> "any motion picture, slide, or other exhibit in which the human male or female bare buttocks, human female bare breasts, or human male or female bare pubic areas are shown, if such motion picture, slide, or other exhibit is visible from any public street or public place." (App. 76)

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[3] See, generally, Cullman, "Double Feature—Movies and Moonlight," *The New York Times Magazine*, October 1, 1950, page 22 *et seq.*

[4] For example, married couples with young children, the physically disabled, etc. See Cullman, *supra* n. 3, at page 68.

In this declaratory action challenging the constitutionality of the Jacksonville ordinance on its face,[5] the Florida courts "did not refine or narrow these words, but took them as they stood." *Lewis* v. *City of New Orleans*, 415 U.S. 130, 132 (1974). "Under the ordinance, any exhibition of the described nudity, regardless of context, is prohibited." *Cinecom Theatres Midwest States, Inc.* v. *City of Fort Wayne*, 473 F.2d 1297, 1301 (7th Cir. 1973). The Jacksonville ordinance therefore embodies a *per se* rule and makes any deviation from its express prohibitions "a violation without regard to the facts and circumstances of a particular case. As so construed, the ordinance is facially overbroad." *Lewis* v. *City of New Orleans, supra* at 135 (concurring opinion of Powell, J.).

In previous cases involving conflicts between speech and privacy, this Court has always sought "[a] satisfactory adjustment of the conflicting interests," *Kovacs* v. *Cooper*, 336 U.S. 77, 81 (1949), and has considered such factors as the location involved and the privacy interests attendant thereto, the nature of the material involved, and the conduct of the speaker or disseminator.

Accordingly, "[i]n order to lay hands on the precise issue which this case involves, it is useful first to canvass various matters which this record does *not* present." *Cohen* v. *California*, 403 U.S. 15, 18 (1971) (emphasis in original).

First, the Jacksonville ordinance does *not* manifest any solicitude for persons in the privacy of their own homes.

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[5] Appellant was charged with a violation of the ordinance because of his exhibition of a film entitled "Class of '74" at the University Drive-In Theatre in Jacksonville in March, 1972, but the prosecution was held in abeyance pending the outcome of this altogether separate declaratory action (App. 76). Accordingly, whether exhibition of "Class of '74" at the University Drive-In Theatre actually constituted a violation of the ordinance would appear not to be an issue in the instant appeal.

Cf. *Rowan* v. *Post Office Dept.*, 397 U.S. 728 (1970); *Breard* v. *City of Alexandria*, 341 U.S. 622 (1951). The ordinance prohibits only nudity on a drive-in screen which "is visible from any public street or public place."

Second, the Jacksonville ordinance does *not* deal with situations in which there is a truly "captive audience." Cf. *Lehman* v. *City of Shaker Heights*, 42 U.S.L.W. 5116 (1974). Unlike advertisements inside a bus, which travel along with and constantly bombard riders, a drive-in is stationary and "[p]assing motorists [are] able to see the screen for only a short moment." *Cinecom Theatres Midwest States, Inc.* v. *City of Fort Wayne*, *supra* at 1303. Moreover, like persons "strolling through Central Park" in New York City, persons in a "public place" in Jacksonville "could effectively avoid further bombardment of their sensibilities simply by averting their eyes" from a drive-in screen. *Cohen* v. *California*, *supra* at 21.

Third, the Jacksonville ordinance does *not* manifest any concern about the "disruption of traffic or traffic accidents." *Cinecom Theatres Midwest States, Inc.* v. *City of Fort Wayne*, *supra* at 1303.[6]

Fourth, the Jacksonville ordinance does *not* deal with situations in which there is an affirmative course of conduct which "force[s] public confrontation with the potentially offensive aspects of the work." *Ginzburg* v. *United States*, 383 U.S. 463, 470 (1966). For example, it does not deal with advertising, which by its very nature is designed to obtrude itself upon the consciousness of unwitting, and perhaps also unwilling, persons. Cf. *Lehman* v. *City of*

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[6] Cf. *80 Drive-In, Inc.* v. *Baxley*, 468 F.2d 611 (5th Cir. 1972) (per curiam); *Chemline, Inc.* v. *City of Grand Prairie*, 364 F.2d 721, 734 (5th Cir. 1966) (concurring opinion of Moore, C.J.); *Vista Theatre Corporation* v. *City of Fort Worth*, 322 F.Supp. 1147 (N.D. Tex. 1971); *Variety Theatres, Inc.* v. *Cleveland County*, 282 N.C. 272, 192 S.E.2d 290 (1972), appeal dismissed for want of a substantial federal question, 411 U.S. 911 (1973).

Shaker Heights, supra; *Packer Corporation* v. *Utah*, 285 U.S. 105, 110 (1932). The images on a drive-in screen are directed toward willing persons inside the theatre; they are not directed toward any unwilling persons who may be outside. See, e.g., *Hess* v. *Indiana*, 414 U.S. 105, 107-108 (1973) (per curiam).

Fifth, the Jacksonville ordinance is *not* directed toward an obstrusive "public display of scenes depicting explicit sexual activities," *Rabe* v. *Washington*, 405 U.S. 313, 317 (1972) (per curiam) (concurring opinion of Burger, C.J.); instead, it is directed toward mere nudity. Thus, for example, the ordinance would *not* apply to a film containing an explicit sado-masochistic "bondage" scene involving bizarrely costumed performers whose breasts, buttocks and pubic areas are clothed; it would, however, apply to a film containing a fleeting glimpse of bare buttocks in a shower scene or a film portraying a culture to which breast nudity is indigenous. The ordinance therefore does *not* deal with that which is "so grossly offensive and emotionally distrubing [to an unwilling audience] as to be the proper subject of criminal proscription," *Rosenfeld* v. *New Jersey*, 408 U.S. 901, 906 (1972) (dissenting opinion of Powell, J.); rather, it deals with the comparatively benign and innocuous.

Sixth, the prohibitions of the Jacksonville ordinance are *not* conditioned upon any actual "interference with the rights of others." *Papish* v. *University of Missouri Curators*, 410 U.S. 667, 670-671 n. 6 (1973) (per curiam). The prohibitions apply merely if a film containing nudity is exhibited at a drive-in theatre whose screen "is visible from any public street or public place." The ordinance, both as written and as construed, does not take into account the nature or duration of such nudity; the clarity of the image viewable outside the drive-in; whether "the visual presentations were so 'obstrusive' as to preclude their avoidance," *Cinecom Theatres Midwest States, Inc.* v.

City of Fort Wayne, supra at 1303; or whether "persons powerless to avoid appellant's conduct did in fact object to it," *Cohen* v. *California, supra* at 22.

"Against this background, the issue flushed by this case stands out in bold relief." *Cohen* v. *California, supra* at 22. It is simply whether, "absent a more particularized and compelling reason for its actions," *Id.* at 26, the City of Jacksonville may constitutionally impose a *per se* prohibition against the exhibition at a drive-in theatre whose screen is visible outside its confines of a film containing a fleeting glimpse of a bare breast. "In that circumstance it is immaterial whether [certain images emanating from a drive-in screen] might be punishable under a properly limited statute or ordinance." *Lewis* v. *City of New Orleans, supra* at 133. The issue is whether the specific Jacksonville ordinance involved in this case is constitutional as it stands.

This Court, which has already expressly rejected a *per se* approach in such areas as flag desecration,[7] criminal contempt,[8] and the use of so-called "fighting words,"[9] should likewise do so here. Just as "words may or may not be 'fighting words,' depending upon the circumstances of their utterance," *Lewis* v. *City of New Orleans, supra* at 135 (concurring opinion of Powell, J.), so, too, the exposure of certain material to an unwilling audience in a public place may or may not invade constitutionally cognizable privacy interests, depending upon the circumstances. Moreover, statutes and ordinances prohibiting "indecent exposure," a crime somewhat analogous to that

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[7] *Spence* v. *Washington*, 42 U.S.L.W. 5148 (1974) (per curiam).

[8] *Eaton* v. *City of Tulsa*, 415 U.S. 697 (1974) (per curiam).

[9] See, e.g., *Lewis* v. *City of New Orleans, supra; Gooding* v. *Wilson*, 405 U.S. 518 (1972).

proscribed by the Jacksonville ordinance, are typically neither construed nor applied in a *per se* fashion.[10]

Certainly, on the basis of the Record in this case, there is no question but that the City of Jacksonville *could* enact an ordinance protecting unwilling persons on public streets and in public places (and in private homes as well) from visual presentations of sexual material which are both grossly offensive and unavoidable. Indeed, this Court has already indicated that states and cities might legitimately concern themselves with "an assault upon individual privacy by publication in a manner so obstrusive as to make it impossible for an unwilling individual to avoid exposure to it." *Redrup* v. *New York*, 386 U.S. 767, 769 (1967) (per curiam). At the same time, however, this Court has carefully noted that, consistently with the First Amendment, legislation manifesting such a concern and its application in particular cases depends upon "a showing that substantial privacy interests are being invaded in an essentially intolerable manner." *Cohen* v. *California*, *supra* at 21.

The Jacksonville ordinance under review here sweeps so broadly and is so misdirected that material which might prove truly "offensive" to unwilling viewers totally escapes its grasp, while material which is comparatively inoffensive falls squarely within its prohibitions. In an era when a reader casually turning the pages of *Time* or *Newsweek* may unwillingly encounter a photograph of a bare breast or a bare buttock, when much of contemporary

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[10] See, e.g., *State* v. *Nelson*, 178 N.W.2d 434, 438 (Iowa Sup. Ct. 1970), cert. denied, 401 U.S. 923 (1971) ("The State's view that nudity per se is a violation is . . . too broad because it could conceivably encompass behavior that is not in fact objectionable to the public concept of morality or violative of the ordered functioning of society"); *In re Smith*, 7 Cal. 3d 362, 365, 102 Cal. Rptr. 335, 487 P.2d 807 (1972) ("[I]n the reported decisions upholding convictions . . . something more than mere nudity has usually been shown").

dress (e.g., "the string" bathing suit) reveals more than it conceals, when nudity on magazine covers confronts those who pass newsstands,[11] and when much which offends the sensibilities of some has become commonplace, it is simply impossible to sanitize public areas to the point where they are "palatable to the most squeamish among us." *Cohen* v. *California, supra* at 25. Yet this is precisely what the Jacksonville ordinance attempts to do. Moreover, although "the mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense," *Id.* at 21, the *per se* prohibitions of the Jacksonville ordinance embody precisely such a presumption.

By contrast, the Arizona and New York "public display"[12] statutes to which Chief Justice Burger referred in *Rabe* v. *Washington, supra* at 317 n. 1, are different from the Jacksonville ordinance.[13] Under the Arizona statute, "all of the proscribed acts, except the depiction of 'human genitalia,' are explicit sexual activities or relationships." *BBS Productions, Inc.* v. *Purcell,* 360 F.Supp. 801, 803 n. 1 (D.Ariz. 1973) (three-judge court). Under the New York statute, "the display of a nude figure, representation, or picture is not per se prohibited." *People* v. *Kurtz* (N.Y.C. Crim.Ct., March 30, 1973, Goldfluss, J.).[14] Thus, the New York statute has been held not to apply to advertisements

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[11] See *Siegel* v. *Salisbury,* 379 F.Supp. 317, 321 (W.D. Pa. 1974), holding a local ordinance prohibiting certain public displays "overly broad and vague with respect to magazine covers depicting nudity alone."

[12] "Public display" is the term of art generally used to refer to legislation of this genre.

[13] The Arizona and New York statutes, and cases arising thereunder, are cited here for illustrative purposes only. We do not express any view as to their constitutionality.

[14] The Court's opinion, otherwise unreported, appears in the *New York Law Journal,* April 4, 1973, page 19, columns 4-5. Copies of the opinion are being filed with the Clerk of this Court simultaneously with the filing of this Brief, and are also being furnished to counsel of record for both parties.

outside a theatre showing "a nude female in a prone position with her buttocks exposed and visible," *People* v. *Lou Bern Broadway, Inc.*, 32 N.Y.2d 816, 345 N.Y.S.2d 1012, 299 N.E.2d 256 (1973) (memorandum decision);[15] an arm patch depicting a man and a woman engaged in mutual oral-genital sexual conduct which was displayed in a store window in such a manner that it was "so unobtrusive as to make it virtually impossible for it to be seen by unwilling audiences," *People* v. *Isaac*, 69 Misc.2d 758, 331 N.Y.S.2d 322, 324 (N.Y.C.Crim.Ct. 1972); and nude mannequins in the window of a "topless go-go" bar, *People* v. *Kurtz*, *supra*. Whatever defects they may have,[16] the Arizona and New York statutes certainly indicate more of an effort than the Jacksonville ordinance to satisfactorily reconcile conflicting claims between speech and privacy.

In short, we do not question the basic constitutional power of states and cities to enact narrow and precise laws which protect unwilling persons against obtrusive public displays of sexual material which are both grossly offensive and unavoidable. However, the existence of this power does not automatically validate every piece of legislation enacted pursuant thereto. The Jacksonville ordinance under review in this case is obviously well-intentioned, but this is not enough. Considering the locations involved, the substantiality of the privacy interests attendant thereto, and the nature of the material against which its proscriptions are directed, it is our view that the *per se* prohibitions of the Jacksonville ordinance "sweep unnecessarily broadly." *NAACP* v. *Alabama*, 377 U.S. 288, 307 (1964). The ordinance is therefore invalid on its face.

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[15] *People* v. *Lou Bern Broadway, Inc.*, 68 Misc.2d 112, 325 N.Y.S.2d 806 (N.Y.C. Crim Ct. 1971), aff'd per curiam, 73 Misc.2d 497, 342 N.Y.S.2d 78 (1st Dep't 1972) held that the advertisements did violate the statute. However, in the decision cited in the text above, the New York Court of Appeals reversed, holding that the advertisements "do not fall within the proscription of the statute" (345 N.Y.S.2d at 1012).

[16] See n. 13, *supra*.

CONCLUSION

For the reasons set forth above, the judgment of the District Court of Appeal of Florida, First District, should be reversed.

Respectfully submitted,

JAMES BOURAS
Attorney for Motion Picture Association of America, Inc., Amicus Curiae